NO. 83-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

APTOS SEASCAPE CORPORATION,
a California corporation,

Appellant,

vs.

THE COUNTY OF SANTA CRUZ, et al.,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it constitutionally permissible for a State Court to hold, unqualifiedly, that there shall never be a monetary remedy available to a landowner whose property has been taken by regulatory conduct over a period of years in violation of the Just Compensation Clause of the Fifth Amendment and contrary to the Civil Rights Act, 42 U.S.C. Section 1983?

2. When there has been a taking of private property for a public use in violation of the United States Constitution, does a proviso for so-called, amorphous "compensating densities" at some time in the indefinite future constitute "just compensation" within the meaning of the Fifth Amendment?

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JURISDICTIONAL STATEMENT [1/]

Opinions Below

1. **The Trial Court Judgment.** A jury having been waived by all parties and after an extremely lengthy court trial, the trial court found, inter alia, that the County had taken 70 acres of Seascape's property for public use in violation of the United States Constitution. The Court awarded to Seascape just compensation in the principal amount of $3,150,000 together with interest thereon and attorney's fees and costs.

1/ The parties are Aptos Seascape Corporation, a California corporation (Seascape); the County of Santa Cruz (County); and, as Amicus Curiae, the California Coastal Commission.

Pursuant to the same trial court Judgment, the County, at its sole option, could have agreed to provide Seascape with 200 so-called "compensating densities" on other properties owned by Seascape rather than paying $3,150,000 plus interest. [2/] Consent by the County to this alternate had to be exercised within sixty (60) days of the filing of the trial court Judgment. In the event that the County selected this alternate, the public agency still was required to reimburse costs of suit and attorney's fees to Seascape. The County did not exercise this option and, by the terms of the Judgment, obligated itself to pay monetary damages. A copy of the trial court Judgment is Appendix A and a copy of the Findings of Fact and Conclusions of Law of the trial court is Appendix B.

2. **Opinion of the California Court of Appeal.** The opinion of the California Court of Appeal was reported at 138 Cal.App.3d 484, 188 Cal.Rptr. 191. A copy of that opinion is Appendix C. The opinion of the Court of Appeal reversed the trial court Judgment awarding $3,150,000

2/ The alternate form of Judgment is in Appendix A. Highlighting the same reveals the following:

a. Within 60 days of the entry of the trial court judgment, the County had the opportunity to file a resolution accepting this option and enacting an enabling ordinance providing a mechanism for compensating densities. Page 10, paragraph 4E.

b. A five-year period was provided for the processing of 200 compensating higher densities by the County. Pages 8-9, paragraph 4C.

c. If the landowner was not provided all the 200 compensating higher densities within the five-year period, then $15,750, plus interest per unit, not so provided was set forth. Pages 8-9, paragraph 4C.

d. The Court further retained jurisdiction of this matter. Page 9, paragraph 4C.

e. The alternate, if not exercised by the County of Santa Cruz, was void. The County did *not* exercise this alternate. Page 11, paragraph 4F.

for the taking of the private property without just compensation, including the alternate judgment for 200 "compensating densities." The Court of Appeal further affirmed the trial court Judgment dismissing the Second Cause of Action for, inter alia, declaratory relief, damages and other relief. Nevertheless, it modified the same by providing, inter alia, that the dismissal is conditioned on the County granting "compensating densities" to Seascape at some time in the indefinite future. Appendix C, page 31. Further, *no* damages, whatsoever, including attorney's fees, costs and other damages, were allowed by the Court of Appeal. Each party is to bear its own costs. Appendix C, pages 49-50.

3. **Judgment.** The Opinion of the Court of Appeal was not a final Judgment until after Petitions for Rehearing were timely filed and denied and timely Petitions for a hearing by the California Surpeme Court were filed and, eventually, denied on April 20, 1983. Appendix G; 28 U.S.C. Section 1957; ***Banks v. State of California*** (1969) 395 U.S. 708. The Notice of Appeal was filed on July 12, 1983. Appendix I.

Concise Statement of Jurisdiction

This is an appeal from a "final judgment" of the "highest court of a state" as required by 28 U.S.C. Section 1257. [3/] Seascape seeks just compensation, damages and other relief pursuant to the United States Constitution and,

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3/ This appeal is from that portion of the judgment regarding Seascape v. County. *No* appeal is made to this Court from that portion of the Court of Appeal Judgment affirming the trial court Judgment in favor of Seascape on the County's cross-complaint.

also, the Civil Rights Act, 42 U.S.C. Sections 1983 and 1988. This includes a request for a reimbursement of attorney's fees and other substantial costs incurred in this matter.

The initial opinion of the Court of Appeal was handed down on December 23, 1982. Timely Petitions for Rehearing by the Court of Appeal were filed by all parties. Appendix D. The Petitions for Rehearing were denied by the Court of Appeal on January 21, 1983. Appendix E. Nevertheless, the Opinion rendered by the Court of Appeal was still not a "final judgment" entered by the "highest court of a state" as required by 28 U.S.C. Section 1257. ***Banks v. State of California*** (1969) 395 U.S. 708, 23 L.Ed.2d 653. Consequently, a timely Petition for Hearing by the California Supreme Court was filed by Seascape. Appendix F. After extending its time to act, the California Supreme Court eventually denied the Petitions on April 20, 1983. Appendix G. Although denying the Petitions for Hearing, three of the seven Justices of the California Supreme Court voted to grant a hearing. Appendix G. Thereafter, the Judgment of the Court of Appeal became a final "Judgment" upon the entry of the same by the Clerk and the issuance of the Remittitur on April 26, 1983. 28 U.S.C. Section 1257; ***Banks v. State of California*** (1969), ***supra***; Appendix H. A timely Notice of Appeal to this Court was filed on July 12, 1983. Appendix I.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1257(2). Cases sustaining the jurisdiction of the United States Supreme Court on appeal to review the State Court Judgment concerning regulatory takings of private property without just compensation are: ***Penn Central Transportation Co. v. City of New York*** (1978) 438

U.S. 104; *Moore v. City of East Cleveland* (1977) 431 U.S. 494; *Penn Coal Co. v. Mahon* (1922) 260 U.S. 393. [4/]

Constitutional and Statutory Provisions Involved

1. **Fifth Amendment, United States Constitution.**

   "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. **Ninth Amendment, United States Constitution.**

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

3. **Fourteenth Amendment, United States Constitution.**

   ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

4. **42 U.S.C. Section 1983.**

   "Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any

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4/ Seascape also petitions this Court to invoke its jurisdiction by Writ of Certiorari pursuant to 28 U.S.C. Section 1257(3) and requests that this JURISDICTIONAL STATEMENT be regarded and acted on as a Petition for a Writ of Certiorari in accordance with 28 U.S.C. Section 2103. See also *Kulko v. Superior Court of California* (Cal. 1978) 436 U.S. 84, 56 L.Ed.2d 132; *Richmond Newspapers v. Virginia* (1980) 448 U.S. 555, 563-564, 100 S.Ct. 2814, 2820, 65 L.Ed.2d 973.

> state or territory, subjects, or subjects to be subject, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. Pertinent County ordinances are reproduced in Appendix J.

Raising the Federal Question

The complaint, the first amended complaint, the multitude of Seascape responses to County motions, the trial briefs, the appeal briefs, the Petition for Rehearing, and the Petition for a Hearing by the California Supreme Court filed by Seascape, all have raised the federal questions and alleged, inter alia, a taking of the subject property for public use without the payment of just compensation in violation of the United States Constitution.

Statement of the Case

Introduction

A few background factors are set forth hereinafter in order to aid the Court in its review of the matter. Although not all inclusive, the following clearly points out that this Court should take jurisdiction of this matter and, further, grant the Petition for Writ of Certiorari.

A. Subject Property

The subject property is composed of approximately 70 acres, consisting, generally, of beach and other land. Adjacent to the subject land on its northwestern boundary and near the coastline is a residential subdivision known as Tract No. 483. As a condition precedent to the 1963 purchase of the property, Seascape was to receive and did receive precise zoning of the land, including the subject 70 acres. The precise zoning of the subject property was provided in the form of "RM" zoning (multiple residential zone), C-2 (hotel), and R-1-BS-20 (residential, building site - 20 acres). This precise zoning permitted, as a matter of right, in excess of 1,000 units on the subject property. As a result of the County conduct over a period of time culminating on December 5, 1972, the density was reduced to zero (0) on the subject property.

B. Power to Expend Public Funds for Open Space.

The County has not only the power to expend public funds to purchase lands for parks, but also to purchase the fee or any lesser interest or right in real property in order to acquire, maintain or preserve open space and the same constitutes a ". . . public purpose . . ." for which "public funds may be expended." California Government Code Sections 6952, 6953 and 51073. The legislative authorization for public entities to expend public funds for the acquisition of open space is not an isolated provision of law. The California Legislature has decreed that every city and county must have in effect a local open space plan. It has

further required the adoption of an open space zoning ordinance by the agency consistent with such plan. California Government Code Sections 65563 and 65910. Nevertheless, the cost of this benefit to the public is to be borne *not* by the private property owner but, rather, by the public at large through the payment of just compensation to the landowner by the public entity. See California Government Code Section 65912.

The County has successfully acquired the subject 70 acres. Yet, rather than pay just compensation to the landowner, the public agency has used a series of actions and inactions over a number of years in a heretofore unsuccessful attempt to obfuscate Seascape's rights under the United States Constitution.

C. 1967 Aptos Area General Plan of the County of Santa Cruz.

The subject property is in the unincorporated area of the County, referred to as "Aptos." On September 26, 1967, the County adopted the 1967 Aptos Area General Plan. With the adoption of the 1967 Aptos Area Plan, the County announcement was made which has not been changed to the present time: that the 70 acres of the real property owned by Seascape shall remain in permanent open space for the benefit of the public.

Although the desire of the County to maintain the subject property in permanent open space for the benefit of the public has remained consistent, the commitment on the part of the County to deal fairly with Seascape and to avoid putting the entire public burden on a private citizen has completely wained. The 1967 Aptos Area General Plan

provided, specifically, for the creation of a Planned Community District as the mechanism for providing the landowner with so-called "compensating densities" in return for the placement of the subject 70 acres in permanent open space. No Planned Community District was ever formed by the County and the County Planning Director has acknowledged that *no* "compensating densities" were ever provided Seascape.

The adopted County Parks and Recreation and Open Space Plan (PROS) placed the acquisition of the Seascape beach in the category for an "immediate action." Boldly confirming that which the County had previously effectuated, the County placed the subject 70 acres in a "park/playground" designation in the subsequently adopted 1974 Aptos Area General Plan. This is the identical designation placed by the County on state-owned parks in the immediate vicinity of the subject 70 acres. Moreover, the subsequently adopted 1974 Aptos Area General Plan not only designated the subject 70 acres as "park/playground" but it also made *no* provision, whatsoever, for so-called "compensating densities."

D. Application for Residential Subdivision on Subject Property.

In March 1971, Seascape filed an application with the County for a residential subdivision on the subject property, Tract No. 553, Unit 7. In response, the Board of Supervisors adopted an Emergency Zoning Ordinance on April 6, 1971, freezing the property. On April 14, 1972, the County Planning Commission rejected Seascape's residential application. Seascape's Appeal to the Board of Supervisors of Santa Cruz County was denied on April 27, 1971.

Seascape, however, was not easily dissuaded. Despite the fact that the County violated California law by issuing *three* extensions of this interim emergency zone freezing the property — prolonging it from April 6, 1971 until the final adoption of Ordinance 1800 on December 5, 1972 — Seascape attempted to work with the County to salvage some sort of relief. See California Government Code Section 65858 (only two extensions to an emergency ordinance were allowed.) The Goetz Development Plan and the Eckbo EIR were submitted by Seascape to the County and were part of the whole record in the permanent zone studies that took place in 1971 and 1972. The Santa Cruz County Planning Commission did not allow Seascape's proposal for development of a portion of the subject 70 acres as requested in the Goetz Plan. Nevertheless, the County Planning Commission did recommend to the Board of Supervisors of Santa Cruz County that Seascape be provided 200 to 250 so-called "compensating densities" in return for leaving the subject 70 acres in permanent open space.

The County Board of Supervisors rejected the proposal of the County Planning Commission. During the hearings of the County Board of Supervisors and shortly before the adoption of Ordinance 1800 on December 5, 1972 (rezoning the subject 70 acres to UBS-50, *U*nclassified, *B*uilding *S*ite — *50* acres per unit *minimum* building site), the Board of Supervisors specifically inquired as to whether any credit could be provided Seascape in return for the placement of the subject 70 acres in the UBS-50 zone if, later, the landowner submitted a Planned Unit Development application on other properties. The County Planning Director correctly informed the County Board of Supervisors that *no* credit could be provided. Minutes of the Board of Supervisors, November 28, 1972. Shortly thereafter on December 5, 1972, the County Board of Supervisors repealed the

interim emergency zone and rezoned the subject 70 acres to UBS-50.

In addition to the above, in any Unclassified zone district (U), to even consider the granting of a *discretionary* use permit or a Planned Unit Development permit (PUD), by County regulation, the proposed use shall be consistent with the standards, densities and uses of the Aptos Area General Plan. County Ordinances, Sections 13.04.306, subparagraph c and 13.04.323, subparagraph c, Appendix J. See also, Findings of Fact, Trial Court Judgment, Appendix B, paragraphs 16, 19-24, pages 10, 11 and 12-15. In turn, both the 1967 Aptos Area General Plan and the 1974 Aptos General Plan specifically placed the subject 70 acres into permanent open space, with the 1974 Plan further categorizing it as "park/ playground" and making *no* provision, whatsoever, for any so-called "compensating densities." Moreover, not only County ordinances but State law requires that zoning shall be consistent with the Area General Plan. California Government Code Section 65860(a).

Thus, the County has rejected Seascape's residential land use application filed in March 1971 on the subject property, Tract No. 553, Unit 7. The County, through the rezoning studies and processes, has eliminated Seascape's land use proposals submitted to the County involving the subject property, commonly referred to as the Goetz Plan and the Eckbo EIR. The County has rejected its own Planning Staff and County Planning Commission's recommendation of 200 to 250 so-called "compensating densities." The County has even rejected the concept of "compensating densities" and placed the subject property in a "park/ playground" designation, via the 1974 Aptos Area General

Plan. Seascape has never received any so-called "compensating densities" or monetary compensation. The County has rejected the trial court's alternate judgment. The adopted County Parks, Recreation and Open Space Plan targeted Seascape's beach for acquisition. Furthermore, over the years, both in advance of and during the County's continuous activites, Seascape has repeatedly warned the County of the unconstitutional and confiscatory nature of that agency's conduct. To date, the County has blithely ignored all these warnings.

After a lengthy court trial, the trial court specifically determined, inter alia, that:

1. The landowner "has fully exhausted all available administrative remedies. Any additional attempt by the plaintiff to petition County for relief would have been a futile gesture." Appendix B, page 16, paragraph 31.

2. The subject 70 acres has been treated by the County as a separate parcel. The subject property is a de facto separate parcel from other lands owned by Seascape. Appendix B, page 15, paragraph 28.

3. "The County has used subterfuge to acquire the subject property as open space for the benefit of all the public without compensating plaintiff for its taking of subject property in any manner whatsoever." Appendix B, page 15, paragraph 25.

4. The "actions and inactions of the County culminating in ordinance 1800 adopted December 5, 1972 were invoked by the County in order to evade the requirement that the subject property must be acquired in eminent domain proceedings." Appendix B, pages 17-18, paragraph 36.

5. "County has taken subject property for the benefit of the public for open space and just compensation is due,

owing and payable by County to Seascape." Appendix B, page 17, paragraph 35.

6. "By its actions and inactions in culminating Ordinance 1800, the County has preserved the subject property for the benefit of the public for open space and park purposes thereby causing a taking of subject property for which just compensation is due, owing and payable by County to Seascape." Appendix B, pages 18-19, paragraph 37.

7. "By the actions and inactions of the County, culminating in the adoption of Ordinance 1800 adopted December 5, 1972, Seascape has been deprived of all reasonable, practicable, beneficial and economic use, and each of them, of subject property by County for which just compensation is due, owing and payable by County to Seascape." Appendix B, page 35, paragraph 1.

> "[A] reviewing court is without power to substitute its deductions for those of the trial court . . ." ***Campbell v. So. Pacific*** (1978) 22 Cal.3d 51, 60, 140 Cal.Rptr. 596.

Statement of Reasons Why the Questions Presented are Substantial and Require Consideration of This Court

A. The California Court of Appeal reversed the monetary judgment for inverse condemnation against the County based on the State Court decision of ***Agins v. Tiburon*** (1979) 24 Cal.3d 266, 273, affd. on other ground, ***Agins v. Tiburon*** (1980) 447 U.S. 255. Appendix C, pages 14-15. Nevertheless, the Court of Appeal did specifically acknowledge that ". . . the United States Supreme Court

may eventually conclude that California cannot limit the remedy available for a taking to nonmonetary relief . . ." Appendix C, page 15. Federal Courts of Appeal and some State Supreme Courts have already rejected the State Court decision in ***Agins*** by pointing out that the United States Constitution requires that monetary relief must be afforded to the landowner. ***Devines v. Maier*** (7th Cir. 1981) 665 F.2d 138, 142; ***Barbian v. Panagis*** (7th Cir. 1982) 694 F.2d 476, 482, fn. 5; ***In re Aircrash in Bali*** (9th Cir. 1982) 684 F.2d 1301, 1311, fn. 7; ***Martino v. Santa Clara Valley Water District*** (9th Cir. 1983) 703 F.2d 1141, 1147-1148; ***Fountain v. Metro*** (11th Cir. 1982) 678 F.2d 1038, 1043; ***Burrows v. City of Keene*** (N.H. 1981) 432 A.2d 15, 20; ***Pratt v. State*** (Minn. 1981) 309 N.W.2d 767, 774. Trial courts are following suit. ***Kinzli v. City of Santa Cruz*** (N.D. Cal. 1982) 539 F.Supp. 887, 896; ***Sheerr v. Township of Evesham*** (1982) 445 A.2d 46.

Whether a state must provide a monetary remedy to a landowner whose property has been taken by regulatory conduct of a public agency in violation of the Just Compensation Clause of the Fifth Amendment has been mentioned by this Court. ***San Diego Gas & Electric Co. v. City of San Diego*** (1981) 450 U.S. 621, 623-624, 101 S.Ct. 1287; ***Agins v. City of Tiburon*** (1980) 447 U.S. 255, 263, 100 S.Ct. 2138. This matter needs to be resolved and this case is the vehicle with which to do the same.

In ***San Diego Gas & Electric Co.***, the landowner never applied for a land development. ***Ibid.*** pages 629-630. The same is true in ***Agins*** wherein the residential zone allowed from at least one (1) home on five acres and up to five (5) homes on five acres and the landowner had not sought an approval for the development of the land. ***Ibid.*** 258. Seascape has made repeated efforts to use its land but to

no avail. The trial court's findings are quite clear in this regard. Seascape "has fully exhausted all available administrative remedies. Any additional attempt by the plaintiff to petition County for relief would have been a futile gesture." Appendix B, page 16, paragraph 31. 5/

The 70 acres are in permanent open space and "by the actions and inactions of the County culminating in the adoption of Ordinance 1800 adopted December 5, 1972, Seascape has been deprived of all reasonable, practicable, beneficial and economic use, and each of them, of subject property by County . . ." Trial Court, Appendix B, page 35, paragraph 1. Even the Court of Appeal decision acknowledges that the 70 acres are in permanent open space. *Eg.*, Appendix C, pages 3, 6 and 30.

The State court ***Agins*** decision is flatly contrary to the United States Constitution, including the Fifth and Fourteenth Amendments thereof. Thus, by this APPEAL, there is jurisdiction of this court. Further, pursuant to Rules of Court 17.1(a), (b) and (c), the State court has decided a Federal question in conflict with another state court as well as in conflict with Federal Appellate Court decisions.

B. In addition to the above, the State court decision, essentially, erases from the law the Civil Rights Act, 42 U.S.C. Sections 1983 and 1988. Neither the viability of the Civil Rights Act, Section 1983 in particular, nor the Federal Constitution can, in any manner, depend upon the states and/or the policies of the states. For example, in ***Testa v. Katt*** (1946) 330 U.S. 386, 390-391, the United States Court reviewed this subject and clearly concluded:

5/ The Civil Rights Act does not require the exhaustion of any purported administrative remedy. ***Patsy v. Board of Regents*** (1982) ____U.S.____, 102 S.Ct. 2557.

> "(*Claflin v. Houseman* (1976) 93 U.S. 130) repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people 'anything in the Constitution or Law of any State to the contrary notwithstanding.' . . . *The obligation of states to enforce these federal laws is not lessened by the reason of the form in which they are cast or the remedy which they provide.* (Emphasis added.)

Likewise, in *Mondou v. New York* (1912) 223 U.S. 1 at 57, the United States Supreme Court dismissed the concept that State Courts could decline to enforce the federal statutes which did not suit the policies of the state.

42 U.S.C. Section 1983 and case law of the United States Supreme Court clearly indicate that this federal law necessarily provides for damages as a "vital component" and shall be ". . . construed generously to further its primary purposes." *Gomez v. Toledo* (1980) 44 U.S. 635, 639, 100 S.Ct. 1920, 1923; see also *Owen v. City of Independence* (1980) 445 U.S. 622, 650-651, 100 S.Ct. 1398, 1415.

> "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the 'misuse of power by virtue of state law and made possible because the wrongdoer is clothed with authority of state law.' . . . A damage remedy against the offending party is a *vital* component to any scheme for vindicating cherished constitutional guarantees, the importance

> of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." (Emphasis added.)

This Court has recognized that an action can be brought under Section 1983 for overregulation. ***Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*** (1979) 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 408. And as stated by the court in ***Lynch v. Household Finance Corp.*** (1972) 405 U.S. 538, 552 (emphasis added):

> "Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the other. *That rights in property are basic civil rights has long been recognized.*"

California is within the Ninth Circuit and a recent inverse condemnation and Civil Rights Act decision was handed down by the Court of Appeals in ***Martino v. Santa Clara Valley Water District*** (April 14, 1983) 703 F.2d 1141. The Court stated that the California Supreme Court in ***Agins*** was wrong and "that damages are recoverable for inverse condemnation." *Ibid.* 1148. Moreover, even assuming arguendo that ***Agins*** was correct, damages under Section 1983 are recoverable for overregulation. *Ibid.* 1148.

Federal trial and appellate courts, generally, have been consistent in concluding that the oppressive use of planning, zoning or police powers can be a violation of the Civil Rights Act and the United States Constitution requiring compensation. See, e.g., ***Wheeler v. City of Pleasant***

Grove (5th Cir. 1981) 664 F.2d 99; *Devines v. Maier* (7th Cir. 1981) 665 F.2d 138; *Dahl v. City of Palo Alto* (N.D. Cal. 1974) 372 F.Supp. 647; *Arastra Limited Partnership v. City of Palo Alto* (N.D. Cal. 1975) 401 F.Supp. 962; [6/] *Cordeco Dev. Corp. v. Vazquez* (D. Puerto Rico 1972) 354 F.Supp. 1355; *Shellburne, Inc. v. New Castle County* (D. Del. 1968) 293 F.Supp. 237, 245; *6th Camden Corp. v. Evesham Township* (D. N.J. 1976) 420 F.Supp. 709; *M.J. Brock & Sons, Inc. v. City of Davis* (N.D. Cal. 1975) 401 F.Supp. 354; *Rasmussen v. City of Lake Forest* (N.D. Ill. 1975) 404 F.Supp. 148; *Lerner v. Town of Islip* (E.D. N.Y. 1967) 272 F.Supp. 664; *Kinzli v. City of Santa Cruz* (N.D. Cal. 1982), *supra*.

Notwithstanding the California Constitution and the federal law requiring the State courts to follow and enforce the federal law including the Constitution, the California courts stubbornly refuse to recognize the law of the United States including the Civil Rights Act and the relief provided for thereunder. Article III, Section 1, California Constitution. This needs to be corrected.

C. The Court of Appeal decision admits that the "County's zoning ordinances are complex and ambiguous, and the relationship among the various sections is confusing as is apparent from the conflicting testimony from various officials charged at various times with administration of these ordinances." Appendix C, page 29. Nevertheless, the Court of Appeal goes on to eliminate the award of all monetary relief as well as the alternate judgment and, then, refers to some amorphous "compensating

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6/ As part of a settlement by which the City paid the property owners $7,500,000, this opinion was later vacated (417 F.Supp. 1125). See Berwanger, *Recent Developments in Judicial Relief for Owners of Land Limited to Public Open Space* (1976) 52 L.A. Bar Jour. 196, 197. (fn. 4.)

densities." [7] Appendix C, page 31. The reason for this not so subtle maneuver is the *Agins* decision of the California Supreme Court. This is merely an attempt by the State court to insulate California from the jurisdiction of the United States Supreme Court and the issue of whether a State court can unqualifiedly hold that there shall never be a monetary remedy afforded to a landowner whose property has been taken by the regulatory conduct of a public agency over a period of years. Further, a nonexistent mechanism for some sort of amorphous "compensating densities" in the indeterminate future cannot be used to obfuscate either the taking caused by the historical overreaching County conduct or the Fifth Amendment requiring "just compensation." [8]

Conclusion

The private property rights of individuals are in jeopardy, especially in California.

7/ As litigation lip service in this lawsuit, the County has incorrectly asserted some nonexistent, rococo way for some sort of "compensating densities." Yet, in reality, there is no such mechanism and the County has adamantly refused to provide "compensating densities" much less "just compensation" as demonstrated by its chronic, overreaching conduct for more than a decade.

8/ Some passing comments in both the majority and dissenting opinions were made by this Court in connection with a New York City ordinance in *Penn Central v. New York* (1978) 438 U.S. 104. Nevertheless, the sordid history of this case resulting from the overreaching conduct of the County is substantially different than the Penn Central case. Further, providing some sort of so-called "compensating densities" some indefinite time down the line for property already taken by the County just does not meet the Constitutional requirement for the payment of just compensation including the mandate for a certain and full equivalent. The taking of property through eminent domain proceedings initiated by the agency requires the award of monetary damages to meet the constitutional muster for "just compensation."

> "I confess to a growing unease about what I view as an accelerating erosion of private property rights of California citizens. . . . Pursuant to the Fifth Amendment to the Federal Constitution and Article I, Section 19, of the California Constitution, let state and city pursue established legal procedures to condemn the property in question, rather than upset long-established principles in order to obtain the property 'on the cheap' as it were." ***City of Venice v. Venice Peninsula Properties*** (1982) 31 Cal.3d 288, 316, 182 Cal.Rptr. 599, 616. (Dissenting Opinion)

The issues presented herein are critical and this Court's guidance, direction and protection are needed not only by Seascape but also by the citizens of California and other states. Thus, Seascape prays that probable jurisdiction be noted or that this Court grant the Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 2103 and Rules of this Court, 17.1(a), (b) and (c).

Respectfully submitted,

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